August 7, 2017

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Via Email to EBSA.FiduciaryRuleExamination@dol.gov
Re: RIN 1210-AB82, Fiduciary Rule Re Examination

Ladies and Gentlemen:

I write to express my individual view on the current Administration's re-examination of the DOL Conflict of Interest – Fiduciary Rule. I strongly support the implementation of the current, Final (2016) DOL Conflict of Interest - Fiduciary Rule, (part of which was made applicable, on June 9, 2017) in full, undiluted and with no further delay, on January 1, 2018.

I strongly oppose any further delay of the DOL Fiduciary Rule or any weakening of its provisions. In addition, as per several court cases brought by industry groups and firms that wish to continue a status quo that is indisputably harmful to Americans saving and investing for their retirement, no further delay of implementation of any part of this Final Fiduciary Rule is necessary. In fact, in his opinion on a case that requested injunction to delay the Fiduciary Rule from becoming applicable, Kansas U.S. District Court Judge Daniel Crabtree said, ***"An injunction will lead to confusion about the law and likely produce unwarranted delay. This is not in the public's interest. Any injunction thus will produce a public harm that outweighs any harm that plaintiff may sustain from the rule change."***[1]

There is no reasonable or justifiable basis for any delay or any watering down of any provision in the Fiduciary Rule. In fact, the DOL has already conducted a full review and justification including a legal and economic analysis, concluding that the Rule is necessary in order for Americans to save and invest for retirement. Numerous Courts have supported the Rule.

Any further delay of the Fiduciary Rule would be arbitrary and capricious. In addition, any delay or derailment would be unlikely to withstand legal scrutiny.

I am writing this letter as an individual and expressing my own views. It was not written on behalf of any entity I may be associated with. I have worked under, studied, written about and guided colleagues with regard to prudent investment fiduciary practices for many years. I have a consulting practice, FiduciaryPath. As an Accredited Investment Fiduciary Analyst® with the Centre for Fiduciary Excellence (CEFEX), I provide independent third-party analysis and verification of the prudent fiduciary processes of Registered Investment Adviser firms. When we verify that a firm conforms to the "Prudent Practices for Investment Advisors," their prudent process may achieve peer-reviewed CEFEX Certification. I am also Editor of the FP Fiduciary Standard Survey.

For many years, I have done pro bono work as an investor advocate. I am a founder, and immediate past Chair, of The Committee for the Fiduciary Standard, and part of its all-volunteer Steering Group of fiduciary practitioners and fiduciary experts. Most members of the steering group run Registered Investment Advisory firms (RIAs) and do, or have, practiced as investment advisors under the Investment Advisers Act of 1940. The majority of the Committee's steering group members had, earlier in their careers, been Series 7 Registered Representatives of Broker-Dealers, before moving to the RIA, fiduciary side of the investment and planning industry. We understand the various arguments supporting and opposing the fiduciary standard – and the motivations behind those arguments.

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[1] Kansas Court Case 5:16-cv-04083-DDC-KGS Document 59 Filed 11/28/16
https://assets.documentcloud.org/documents/3226360/Market-Synergy-DOL-20161128.pdf

The Committee, a community of over 1,100 fiduciary advisor members, is led by this Steering Group and seeks to inform and nurture a public discussion on the bona fide fiduciary standard of conduct as applied to the delivery of investment and financial advice, for all clients, at all times, in all accounts.

The Committee advocates for the fiduciary standard because we know fiduciary advice and/or investment management leads to better investor outcomes.

Better Retirement Investor Outcomes Are Strongly in the Public Interest.

The run up to the Fiduciary Rule inspired a dialogue about the fiduciary standard that has reach the investing public as well as those in the investment industry. This year in particular, there have been several developments supporting the DOL Fiduciary Rule in its full, undiluted state.

So far, this year:

- DOL's Fiduciary Rule (Impartial Conduct Standard) became applicable on June 9th, with the additional provisions applicable January 1, 2018.
- Multiple Courts ruled that the DOL was within its jurisdiction and authority to propose the Fiduciary Rule, opining that the cost to the industry does not outweigh the need for this rule and its benefits to the public, and that it is in the public interest to implement it without delay. Some Court's rulings are under appeal.
- CFP Board has requested comments on a proposed new professional standard that would require CFP certificants to act in clients' best interests *at all times*.
- CFA Institute has written a letter to SEC suggesting title reform in which certain titles would apply to only to fiduciaries.
- Nevada has passed a law requiring investment/financial advice and financial planning to be provided on a fiduciary basis.

The DOL's own rigorous analysis before proposing the Fiduciary Rule notes that conflicted advice or recommendations cost investors $17 BILLION a year, in excess costs and their drag on performance. However, the Consumer Federation of America notes: "The estimate of $17 billion in losses is extremely conservative. It only includes broker-sold mutual funds and Variable Annuities in IRA accounts. This analysis didn't include other investments that often result in much greater, often irreparable losses to investors. For example, it didn't include fixed indexed annuities and non-traded REITs. Nor did it include an estimate of the harm that befalls retirement savers in the 401(k) space.

Some observers mistakenly believe that 401(k)s are uniformly advised in the best interests of the participants and beneficiaries. But, especially in the smaller 401(k) space, under $100 million in plan assets, 401(k) investors are often harmed by non-fiduciary advice. I have personally seen this. Many non-fiduciary broker-dealers and insurance companies have used the "Five Part Test" in the original ERISA legislation to 1) slide through one of the five parts and recommend self-serving menus of plan alternatives that routinely overcharged retirement savers, and, 2) pretend that they were sharing fiduciary responsibilities, when they were not. It is a very positive development that the "Five Part Test" has been eliminated by the 2016 Final Rule.

DOL's 2016 Final "Fiduciary Rule will stem the losses retirement savers are suffering."[2] **But all of the protections – and remedies – afforded in the final Fiduciary Rule need to be applicable on schedule, January 1, 2018**, in order to prevent investor harm that comes from firms that still want to skirt their fiduciary duty to place the investor's interests before their own. **These remedies include the all-important right of private action for IRA advice and investment management and the ability for investors to form a class and file suit when firms show a pattern of self-serving, abusive behavior that harms retirement investors. Arbitration is not enough of a deterrent.**

In a recent article in The Wall Street Journal, Sen. Lindsey Graham (R-SC), noted, speaking about financial abuses on consumers: "arbitration is "a windfall for the companies in terms of how you settle their cheating." He continued:

[2] Consumer Federation of America, M Hauptman, http://216.30.191.148/RetirementRipoff/

"You've had banks and credit-card companies nickel-and-diming consumers, and one of the things that makes them think twice is the idea of a massive lawsuit," Sen. Graham said.[3]

It should be noted that when RIA firms advise retirement plans and retirement investors as fiduciaries, there is no evidence of rampant class action lawsuits. In fact, whether in retirement plans or taxable assets, fiduciary advice, such as that from RIA firms, driven by loyalty to the client and prudent, documented decisions and actions generates very little in the way of court actions. A prudent, documented fiduciary process is actually a very good defense in court.

A comprehensive analysis by the Economic Policy Institute concludes that the Administration's delay until June 9th cost retirement savers $532 a minute, $1.9 an hour, or $46 million a day. EPI concludes that, conservatively, a retiree who receives conflicted advice when rolling over from a 401(k) to an IRA would "run out of savings 5 years earlier than someone who did not receive conflicted recommendations."[4]

As stated in the Federal Register, "By Memorandum dated February 3, 2017, the President directed the Department to conduct an examination of the Fiduciary Rule to determine whether it may adversely affect the ability of Americans to gain access to retirement information and financial advice. As part of this examination, the Department was directed to prepare an updated economic and legal analysis concerning the likely impact of the Fiduciary Rule and PTEs, which shall consider, among other things:

- Whether the anticipated applicability of the Fiduciary Rule and PTEs has harmed or is likely to harm investors due to a reduction of Americans' access to certain retirement savings offerings, retirement product structures, retirement savings information, or related financial advice;
- Whether the anticipated applicability of the Fiduciary Rule and PTEs has resulted in dislocations or disruptions within the retirement services industry that may adversely affect investors or retirees; and
- Whether the Fiduciary Rule and PTEs is likely to cause an increase in litigation, and an increase in the prices that investors and retirees must pay to gain access to retirement services."

Sadly, the new Administration did not consult in any depth with fiduciaries already working in the best interest of investors both in retirement accounts and in taxable accounts. In my view, that was a serious mistake because the loudest views the current Administration has received are driven – and funded – those who wish to continue a harmful-to-retirement-savers status quo, enriching themselves directly at the expense of retirement investors.

Those loud industry views are false, however. It has been disheartening to see, since 2010, broker-dealers, banks, insurance and mutual fund firms – often through their well-funded lobbying organizations – lie repeatedly and foment confusion among investors and even some industry professionals. They claim that advice in the best interest of investors, with fulsome and clear disclosure and at a reasonable expense is not good for investors.

How can that be? We know DOL is not falling for that. The financial services lobby's claims – that fiduciary advice for investors is more expensive, limits access to advice or products, or is harder to conform to – are categorically untrue.

P.S., the longer the delay of the Rule's implementation, the higher the revenue for the lobby groups fighting it, and the higher the amount of hard-earned savings that is extracted from retirement investors' accounts, rewarding those who still may skirt the Rule. We discuss some false financial services assertions in the next section of this comment.

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[3] GOP Effort to Overturn Arbitration Rule at Risk From GOP Defectors https://www.wsj.com/articles/gop-effort-to-overturn-arbitration-rule-at-risk-from-republican-defectors-1502020803

[4] EPI "Methodology for estimating the losses to retirement investors of fiduciary rule delay "http://www.epi.org/publication/addendum-methodology-for-estimating-the-losses-to-retirement-investors-of-fiduciary-rule-delay/

Access to Advice, Reasonable or Low Costs, and Investor Choice

Investor access to advice will increase, not decrease under the Fiduciary Rule. Currently, investors who do not work with a fiduciary often get misleading sales pitches – frequently for the products that pay representatives and their firms the most. **A sales pitch, especially when crafted to appear as advice, is not advice**. **It's deliberately misleading and deceptive.** In fact, under the Securities Exchange Act of 1934, brokers do not provide substantive advice. In addition, many broker-dealer reps are discouraged from working with smaller investors. But when they do, until the Jun 9 start of the "Impartial Conduct" provisions of the Fiduciary Rule, they were not required to provide advice in the investor's best interest. Even now, however, investors can still be harmed if the Rule is watered down by eliminating important requirements slated to be applicable Jan 1, 2018

Insurance agents (non-fiduciaries) who scare investors into rolling out of 401(k)s into high commission, harmful annuities are not advising investors. But they claim to be, in title and advertising. I've seen firsthand how retirement investors are lied to in order to scare them into agreeing to an annuity purchase that is in the best interest of the salesperson (masquerading as an advisor) – not the retiree. That harm can be irreparable, and often takes a horrific toll on the retirement investor.

The losses that result from conflicted advice can be significant. After a careful review of the evidence, which consistently points to a substantial failure of the market for retirement advice, the DOL estimated that IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 50 to 100 basis points per year over the next 20 years. Often retirement investors save for 30 or 35 years, however so, the estimate below is, if anything, very understated.

Based on this careful review of the evidence, the DOL concluded that the underperformance associated with conflicts of interest – in the mutual funds segment alone – could cost IRA investors between $95 billion and $189 billion over the next 10 years and between $202 billion and $404 billion over the next 20 years. An ERISA plan investor who rolls her retirement savings into an IRA could lose 6% to 12% and possibly as much as 23% of the value of his or her savings over 30 years of retirement by accepting advice from a conflicted financial adviser. These DOL estimates are conservative. The harm to retirement savers is far greater when you consider the full range of products and the full range of conflicts that influence advisers' investment recommendations.

Clean Shares and Compliance

It should be noted that in the grace period after the Final Fiduciary Rule was released in April 2016 up until the Administration's Feb 3 proclamation that the Rule should be examined, "clean shares," and other viable products were being created at a rapid clip. Low-cost investing via fund groups such as Vanguard, and low-cost automated investment firms like Betterment, both of which are providing investment allocation and portfolio management advice at a nominal cost, are thriving.

But, confusion and uncertainty after the Administration's Feb 3rd memo has put a damper on new development and we would not want to see that kind of administrative sabotage lead to any delay in the applicability date of the rest of the provisions of the Fiduciary Rule.

Likewise, **firms that had the most changes to implement in order to conform to the Fiduciary Rule were largely finished and were testing, or close to finished as the April Applicability date rolled closer**. The Final Rule effective date in April 2016, with a two-part grace period until April 2017 and Jan 2018 for applicability, was a sufficient amount of time for any firm that is serious about serving retirement investors as fiduciaries to get their compliance and processes in order.

And, most BDs, (including insurance, fund and bank-affiliates) already have an RIA arm. Moving from the RIA processes that already should be present under the '40 Act, to the DOL Fiduciary Rule requirements is certainly doable in the original DOL timeframe.

There is no reason to delay implementation of the balance of the Fiduciary Rule to wait for more products. Products already exist that can readily be used to fulfil client goals on a fiduciary basis. RIAs have used them for decades. More are being developed. This is not an issue.

Choice and Cost to Investors

The DOL Fiduciary rule has, even before its full applicability date, made investor access to both fiduciary advice and self-directed investing more available, at reasonable or low costs. For some investors who just want advice on how to allocate their assets in a diversified portfolio, low-cost automated advisory accounts can be accessed easily, with low or no minimum investment, and at a very low cost. For very small accounts, some automated investment "robo advisors" will manage assets up to a certain size at no charge.

Nothing in the Rule insists that retirement investors must purchase advice. It only stipulates that when retirement investors seek or receive advice, *the advice must be in the investor's best interest.* That is very reasonable. **For IRA investors who wish to make their own investment decisions and do not need or want advice, costs of trading in their IRA accounts have come down** in the 15 months since the Fiduciary Rule became effective. Their choices are limited only by the firm they choose to work with. Many online brokers have no minimum account size for self-directed investors. Costs to self-directed investors are very low. For example, many online firms such as Schwab and Fidelity recently lowered the cost of online trades for self-directed investors to $4.95. TD Ameritrade, E-Trade and others have similarly lowered trading costs. There are many mutual funds available online for self-directed retirement investors that have expense ratios in the single digits, 0.07 or 0.09 basis points for index funds, for example, and investment minimums are falling.

In plans, the cost of fee-only fiduciary advice means a plan menu of higher quality, lower cost plan alternatives, fiduciary care stipulated in the agreement, an IPS for the plan, services including due diligence, monitoring, watch list, and replacement of plan investment alternatives when necessary. It also can mean, depending on the scope of the advisory engagement, model portfolios from plan alternatives that investors can select from as plan alternatives if they don't want to allocate their 401(k) portfolio themselves. More, low-cost index funds or ETFs, educational meetings for participants, fee and performance benchmarking on a regular basis, and plan trustee or investment committee support. It also means plan fiduciaries actually get a prudent expert to help them manage a plan and take on the investment portion of the plan's fiduciary responsibility. Many of the RIA firms that serve plans as 3(38) investment managers or 3(21) investment advisers have also vetted reasonable cost, high quality outside service providers they can recommend if asked. Again, fee-only RIA fiduciaries do not get paid anything other than their fee for advisory services. **It turns out that when conflicts of interest are avoided or managed in the investor's best interest, more services are provided, and costs often are lower than when conflicts of interest exist. That is one of the many reasons that advice from a fiduciary typically makes a positive difference in investor outcomes.**

Fee-only RIA firms that are paid for services solely by the investor have recommended no-load, no revenue sharing, reasonable cost mutual funds and other investments for many years. Many mutual fund and even some insurance companies are beginning to use the available "clean shares" and fee-based annuities that can assist firms that are newer to the fiduciary fold but still using a commission based model and the BICE contract to fulfill their fiduciary duty to retirement investors.

Brand New Data on Fiduciary Attitudes of Intermediaries Toward Fiduciary Duty

Key Findings: Once the DOL Fiduciary Rule is in Effect:

- Most intermediaries project AUA in retirement plans and IRAs to remain steady or grow.
- They will to continue to work with retirement investors and plans.
- It does not cost investors more for fiduciary advice.
- Fiduciary advice does not limit access to advice or products.
- Most firms set to comply with Fiduciary Rule or very close.

> "Financial professionals who work with investors every day are ready for – and many already abide by – the fiduciary standard. Registered Investment Advisers already do so. And, in contrast to what some lobby groups or firms have said, providing advice that is in the best interest of investors does not cost

investors more, or leave investors without advice or investment or financial products or services," according to findings of the 2017 FiduciaryPath Fiduciary Standard Survey.[5]

The Fiduciary Survey has periodically surveyed financial intermediaries who provide advice to investors. The survey seeks views from those providing advice across the various registration and licensing types and compensation models. The goal is to understand their attitudes about the fiduciary standard, how they incorporate it into their practices, how they prepare for new regulations, which ways their firms support them, how they are compensated and whether new rules may change how they work with clients."

This is the 5th survey of financial professionals who advise investors, across the spectrum of business models. This year, 777 financial professionals provided their views on 44 questions from March 24 to June 2nd. Survey respondents include Registered Investment Advisors/Investment Advisor Representatives, Broker-Dealer Registered Representatives, Dual Registrants (RIA/IAR-Registered Rep), Dual Registrants/Insurance License (Dual+Insurance), and Insurance Professionals (Producers and Consultants).

Does it Cost Investors More for Fiduciary Advice?

The DOL Rule does not prohibit any product that is in the investor's best interest. *However, products that are not in the investor's best interest will be less likely to be recommended as the DOL Rule rolls out – because they are not in the investor's best interest."*

"Responses to this year's survey are consistent with prior years' survey responses:
Nearly three-quarters of respondents say it does not cost more to work with fiduciary advisors. The survey asked: "**Do you believe it costs investors more to work with fiduciary advisors than brokers when all costs to the investor (not only the advisor's compensation) are considered?"**
73% No
27% Yes

Products and Services

Survey respondents say a fiduciary duty for brokers who provide advice would not reduce product or service availability for investors. The survey asked, **"Do you believe a fiduciary duty for brokers who provide advice would reduce product and service availability for investors?"**
57% No
43% Yes

Again, this year, a large number of comments from respondents who answered "yes," note that access to products that are harmful to investors would likely be reduced, since they are not in the investor's best interest.

Advisors Expect Retirement Investor, Plan AUA to Increase or Remain Steady

The 2017 survey was in the field before the DOL Rule's June 9 applicability date, and we specifically geared some questions to gauge attitudes with regard to pre- and post-DOL Rule services to investors. To get a baseline, the survey asked: **"What types of retirement clients do you serve?** (check all that apply)"
87% serve investors with IRAs
71% serve plan participants
66% serve qualified plans

ERISA Assets

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[5] "New Survey: DOL Fiduciary Rule Does Not Cost Investors More or Limit Investor Access to Advice or Products; Firms Are Prepared." Kathleen M. McBride, AIFA© https://www.linkedin.com/pulse/new-fiduciarypath-survey-dol-fiduciary-rule-does-cost-mcbride-aifa-

Assets under advisement for *individual* clients in ERISA retirement accounts, IRAs or other accounts subject to the DOL Fiduciary Rule comprise 51% or more of total AUA for 47% of respondents. Another 20% indicate these assets comprise 31% to 50% of their AUA.

Advice to ERISA *plans* comprises more than 50% of the AUA for 31% of respondents: more than 75% of AUA for 18% of respondents and from 51% to 75% of AUA for 12% of respondents.

Eighty percent of financial professionals expect the AUA in accounts subject to the DOL Fiduciary Rule to increase or stay the same. The number of respondents that expect their *assets to increase* is equal to the number of respondents that expect their *AUA to stay the same*: 26% expect an increase in *qualified retirement asset*s, and 15% expect *IRA rollover assets* to increase, while 40% expect those assets to stay roughly the same. Only 4% of respondents expect a decrease In IRA rollover assets and 2% expect a decrease in qualified retirement assets.

Analyzing answers to his question by compensation model, most fee-only respondents, 87%, expect AUA subject to the DOL Rule to stay the same or increase. More than 35% expect DOL Rule AUA to increase: 21% expect an increase in *qualified retirement assets* and 14% anticipate expect *IRA rollover assets* to increase, while 52% in the fee-only model expect retirement AUA to remain at the same level."

Similarly, 78% of respondents in the fee/commission model expect their AUA under the DOL Rule to remain the same or increase. Most, 49% of respondents, expect increased AUA under the DOL Rule: 34% of expect an increase in *qualified retirement AUA* and 15% expect to see an increase in *IRA rollover AUA*, while 29% expect their AUA subject to the DOL Rule to remain the same. Another 7% expect a decrease in IRA rollover assets and 4% expect a decrease in qualified retirement assets.

Most commission-only compensation respondents, 48%, expect their AUA under the DOL Rule to stay the same or increase. In this group, 20% expect an increase in AUA: 12% expect IRA rollover AUA to increase, and 8% predict qualified retirement assets to increase, while 28% expect AUA subject to the DOL Rule to remain the same. However, 12% of commission-only respondents expect a decrease in IRA rollover assets.

But there is more uncertainty among commission-only intermediaries: 40% indicate they don't know if their AUA subject to the DOL Rule will increase or decrease. There was uncertainty over the Rule's future during the Administration's delay from Feb 3 to June 9, and since commission-only intermediaries' firms may have had to make adjustments with regard to compensation, in order to comply, there may have been more uncertainty at firms where compensation is typically via commissions.

The survey probed further: **"If you answered "No, I expect a decrease in qualified retirement or IRA assets"** to the prior question, **"Do you expect to stop providing advice on certain assets as a result of the DOL Rule?"** Most respondents, as discussed above, expect retirement AUA to increase or remain roughly the same.

Fewer than 3% of all respondents expect a decrease in *qualified retirement assets*, and fewer than 3% say they will stop providing advice on qualified retirement assets.

Just over 4% overall expect a decrease in *IRA rollover assets*, but just over 2% say they will stop providing advice on IRA rollover assets.

More than 22% of all respondents say the DOL Rule will have no effect on the types of assets on which they provide advice, and 68% say N/A – because they did not expect a decrease in retirement assets, or do not currently advise retirement investors or plans.

Fiduciary Relationships with Investors

The survey asked: **"Do you have a fiduciary relationship with your clients?"**

Most financial professionals, 94%, have a fiduciary relationship with some or all of their clients:

- 67% of financial intermediaries have a fiduciary relationship with all clients.
- 27% serve some clients in a fiduciary capacity and others in a non-fiduciary capacity.

It is notable that this question generates sizeable indications of fiduciary intent by participants who were not generally *required* to abide by the fiduciary standard prior to the DOL Fiduciary Rule. We have found this result in each Fiduciary Survey we have conducted since 2010. Outside of RIA firms, which are, by law, fiduciaries, many financial intermediaries also want to place client's interests first.

There's the acknowledged business case that client retention is less expensive and time consuming than client acquisition. But brokerage and insurance intermediaries are ranked by "production," and approved investment/financial products often have incentives that generate varying amounts of revenue for firms and intermediaries. This creates challenges to place clients first, even when intermediaries want to and do (within the confines of firm platforms, etc.,) without the underpinning support of regulation and firm compliance.

This brings us to an element of the DOL Fiduciary Rule that often is overlooked: **The Rule requires both financial intermediaries *and firms* to support the fiduciary standard for advice** under the Impartial Conduct Standard, which requires: 1) advice in the investor's best interest; 2) no misleading statements or disclosures; and, 3) only reasonable compensation (all-in, to firm and intermediary). Advice on the 401(K) rollover decision is also now a fiduciary act.

The Rule requires non-fiduciary firms to provide more support on fiduciary compliance, process and products, with product offerings and compensation practices evolved, where necessary, to enable financial intermediaries to work within the DOL Rule. This, then, provides more actual fiduciary support for financial intermediaries who already were working to place their client's best interests first, but have been "swimming upstream" against the current, against incentives, against reviews and rankings that for non-fiduciaries have typically been based on revenue and commission "production."

The FP Fiduciary Survey's findings indicate that firms and intermediaries are much further along than financial services industry rhetoric would suggest. After all, they were shooting for an April start date. And again, most BDs already had RIA departments for which they would have needed compliance resources and support for the '40 Act fiduciary standard. Not as stringent, but much of the way there. It's not a giant leap to get to the DOL Fiduciary requirements from the RIA requirements – if firms were supporting those correctly.

It would be in the public interest to have a discussion about how firms should review the performance reviews of employees who are advising retirement plans and investors, who should not in all fairness be ranked on "production," anymore. Other metrics would better reflect a bona fide advisory model, such as client retention rates, satisfaction rates and retirement readiness outcomes and metrics.

How Are Firms Preparing for the DOL Fiduciary Rule?

DOL provided a one- to two-year grace period for firms to put in place fiduciary compliance after announcing the final DOL Fiduciary Rule. Intermediaries indicated that firms were, for the most part, ready.

The survey asked financial intermediaries: **"Which standard of care does your firm support?"** (check as many as apply). Overall, 75% of respondents report that their firm supports the ERISA fiduciary standard, 60% note their firms supports the Investment Advisers Act of 1940 fiduciary standard, and 41% say their firm supports the BD suitability standard.

The most typical changes firms are making to financial professionals' practices are in fiduciary process and fiduciary training, say 52%, and type of compensation, say 28%. Firms are also making changes to sales training, 16%, certification requirements, 16%; product training 14% and investment theory and portfolio diversification, 13%.

By compensation type, 72% of commission-only, 66% of fee/commission and 37% of fee-only financial professionals indicate their firm has made changes to fiduciary process and training. Nearly half of those in the fee/commission model, 49%, and 32% in the commission-only model indicate changes in their type of compensation. Forty percent in the commission-only model and 24% in the fee/commission model also indicate changes in certification requirements. And 32% of commission-only and 20% of fee/commission intermediaries note changes in investment theory and portfolio diversification training.

Many participants, 36%, selected "Other" and commented. A sampling of the prevalent themes is included below:

- Most comments: "No change needed, already fiduciary," or "Slight tweaks to fiduciary process."
- "Transitioning to all fee; low fee, NTF contracts."
- "Refined standardized checklists for Rollover evaluations."
- "Preparing to use BIC contract."
- "Increased Conflict of Interest disclosures."
- "More explicit handling of retirement plan rollovers to IRAs. Treating recommendations to rollover from plans as explicit Conflict of Interest requiring disclosure and managing this in the client's favor."

Compensation on Retirement Assets Under DOL Rule

The Survey asked: **"Regarding assets held in qualified retirement plans subject to the DOL Rule, how do you expect to be compensated for advice you provide at the plan level – on selection of plan investment alternatives, such as which funds to include in the plan menu?"**

Most survey respondents, 68%, expect to be compensated as a level-fee (fee-only) fiduciary for plan-level advice on assets in to qualified plans. Another 9% expect a combination of level and non-level compensation arrangements, while less than 4% expect to receive variable (non-level, transaction-based) compensation as a fiduciary under the Best Interest Contract Exemption (BICE).

"When you provide <u>plan-level advisory services</u>, will you act as a:"

50% 3(21)
15% 3(38)
16% other - in comments mostly both 3(21) and 3(38); for example, 3(21) for plan menu recommendations and 3(38) if providing model allocation portfolios using plan alternatives.

"When the DOL Rule is in full effect, will you provide advice to clients on IRA Rollovers?"
Yes, say 90% of financial professionals, they will continue to provide advice to clients on IRA rollovers once the DOL Rule is in full effect: 63% expect to do so at about the same level as before. 19% expect to do so more frequently than before. Another 8% expect to do so, but less than before. Only 10% say no, they won't provide advice to investors on rollovers.

"How do you expect to be compensated for advice you provide regarding <u>IRA accounts</u> subject to the DOL Rule?"
Most financial professionals, 65%, expect to be compensated as a level-fee fiduciary when they provide advice regarding IRA accounts subject to the DOL Rule. Another 13% expect to act as a fiduciary under a combination of level and non-level compensation arrangements, while 7% plan to be compensated as a fiduciary who receives variable (non-level, transaction-based) compensation under the Best Interest Contract Exemption (BICE).

"When the new fiduciary rule goes into effect, any advice to a participant about whether they should keep money in plan, roll to another plan, roll to an IRA or cash out is considered a fiduciary act. Do you have a process in place for advising 401(k) plan investors about these decisions?" (Choose one)
Nearly all survey respondents, 95%, have a process in place or are working on a process to provide fiduciary advice to 401(k) participants about whether it is in the participant's best interest to remain in the 401(k) or roll out to an IRA. That advice is now a fiduciary act under the DOL Rule. Nearly 54% have a manual process in place; 23% have a technology driven process in place and another 18% are working on a process for advising investors about these decisions.

These findings lead us to conclude that, 1) the DOL Fiduciary Rule will not impede investor access to advice and investment products, and 2) fiduciary advice to investors, including retirement investors does not cost more than non-fiduciary recommendations, and according to survey respondents, often will cost less, all-in, and include more services."

DOL asked in the RFI: Would there be "Disruption or dislocation in the retirement services industry that would adversely harm investors?" No, not according to FiduciaryPath's survey findings over five surveys since 2010.

And not, according to a 2012 Texas Tech study of the effect of state requirements for fiduciary duty for broker-dealer registered reps. The study found that, "the number of registered representatives doing business within a state as a percentage of total households does not vary significantly among states with stricter fiduciary standards. A sample of advisers in states that have either a strict fiduciary standard or no fiduciary standard are asked whether they are constrained in their ability to recommend products or serve lower-wealth clients. We find no statistical differences between the two groups in the percentage of lower-income and high-wealth clients, the ability to provide a broad range of products including those that provide commission compensation, the ability to provide tailored advice, and the cost of compliance."[6]

Might There Be An Increase In Litigation?

As DOL itself noted when publishing the June 9 applicability date for portions of the Fiduciary Rule, of the 193,000 comments and petition letters the DOL received about the Delay Proposal, 178,000 opposed any delay whatsoever, and only 15,000 supported a delay. **That overwhelming support for the Fiduciary Rule *in its current form* is notable and very important.**

One of the elements of the Fiduciary Rule, now scheduled to become applicable January 1, 2018, is the retirement investor private right of action, including the right to form a class. ***This is a very important investor protection and deterrent to harmful advice, and should become applicable no later than January 1, 2018.***

Eliminating the private right of action and ability to form a class would not be in the public interest – as Courts have opined. While non-fiduciaries have expressed concern, the DOL should ask itself how many class actions has DOL seen filed against fiduciary advisory firms? If conflicts are avoided and unavoidable conflicts are managed in the best interest of the investor, as the Fiduciary Rule requires, only firms that continue harming investors would likely be subjects of such suits. As a country, we should not allow firms to harm investors and pay subsequent fines as 'a cost of doing business.' *Many retirement investors who have been harmed by non-fiduciary advice, recommendations or deceptive, manipulative and misleading practices, can never recover.*

Arbitration is not a deterrent from harming investors, as noted earlier in this comment. The strong deterrent of the ability to form a class is essential to the strength of this Rule and needs to be included as is.

[6] Michael Finke, Ph.D., CFP®, and Thomas P. Langdon, J.D., LL.M., CFP®, CFA, The Impact of the Broker-Dealer Fiduciary Standard on Financial Advice, http://bit.ly/2ontDLH "

A note about “investor access” to products of all types: the DOL Rule did not disallow any insurance or investment products, rather it requires that advice be in the best interest of the recipient. If a product is not in the best interest of the investor it should not be recommended. *There are harmful products out there that are not in the best interest of many investors. That’s a flaw in the product and incentives, not a flaw of the Fiduciary Rule. Private right of action, including class action, should stay in the Rule.*

Fiduciaries Already Work in Investor’s Best Interest

It should be noted that there are already many fiduciaries at work in the best interest of investors. The 36.4 million investors who work with fiduciary Registered Investment Advisers already receive advice in their best interest, at a reasonable cost, from the 11,800-plus RIA firms that serve investors as fiduciaries – in all types and sizes of accounts – not only in retirement accounts. RIAs employ 781,000 individuals, and manage $66.8 trillion, according to the Investment Adviser Association's 2016 Evolution Revolution[7] report.

In the retirement context, the goal is ultimately a bigger nest egg, via a diversified portfolio to mitigate risk and improve risk-adjusted performance, so that retirement investors can retire with dignity and financial security. We advocate on behalf of investors, not ourselves. Can those who oppose the Fiduciary Rule say that? None that I can identify. In fact, those who oppose this rule have financial axes to grind. When they complain about the “cost” to them of complying to the DOL Fiduciary Rule, aren’t they actually saying that they overcharge investors?

To be clear, Registered Investment Advisers – already fiduciaries – stand to lose an important competitive distinction when all firms working with retirement investors must act as fiduciaries. But it is so important that every American who sacrifices to save for their own retirement should have advice that is in their best interest, it supersedes that competitive differentiator. Retirement investors need – and believe they are already getting – advice that is in their best interest. Nothing less will help them to achieve their goal of a secure retirement.

I refer you to The Committee’s letter of strong support for the current, 2016 Final Fiduciary Rule, and strong opposition to any further delay or weakening of any provision. The Committee’s letter notes: “Since the [Fiduciary] Rule was made effective, there have been five lawsuits (consolidated from nine) from non-fiduciary entities protesting that they would now have to place retirement investors’ best interests before their own and seeking to stay the Rule. Courts, ruling in four[8] of the five cases so far, have found in favor of the DOL Fiduciary Rule and retirement investors, noting that delay would not be in the public interest.”

“Kansas U.S. District Court Judge Daniel Crabtree said, “*An injunction will lead to confusion about the law and likely produce unwarranted delay. This is not in the public’s interest. Any injunction thus will produce a public harm that outweighs any harm that plaintiff may sustain from the rule change.*” ”

This confusion is already happening – but only because of the Administration’s delay and re examination of the Fiduciary Rule.

“Judge Crabtree added: DOL “*has concluded that significant public interests favor the proposed regulatory changes. As already explained, evidence in the administrative record supports the DOL’s determination, and the court finds no basis for contradicting those findings*.”

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[7] “Investment Adviser Association's 2016 Evolution Revolution Report”
https://www.investmentadviser.org/eweb/Dynamicpage.aspx?webcode=evrev
[8] Washington DC Court Case 1:16-cv-01035-RDM Document 55 Filed 11/23/16
https://assets.documentcloud.org/documents/3224894/NAFA-20161123.pdf
Kansas Court Case 5:16-cv-04083-DDC-KGS Document 59 Filed 11/28/16
https://assets.documentcloud.org/documents/3226360/Market-Synergy-DOL-20161128.pdf
Texas Court Case 3:16-cv-01476-M Document 137 Filed 02/08/17
http://courthousenews.com/wp-content/uploads/2017/02/Adviser-Rule.pdf
Minnesota Court CASE 0:16-cv-03289-SRN-HB Document 44 Filed 02/21/17
https://assets.documentcloud.org/documents/3472998/Thrivent-Order-Minnesota.pdf

The 2016 DOL Fiduciary Rule has triggered a race to the top, in a way that benefits investors and also the firms that embrace genuinely placing investor's best interests before their own.

Investor Costs When Working With a Fiduciary

I don't know of any investor advocate who says that fiduciary investment advice should be provided for free. In fact, the model for firms whose investment fiduciary process is certified by independent fiduciary analysts, like me – and reviewed every year – is typically compensation via a reasonable, transparent, fee-only model. The fee-only model is typically based on a percentage of assets under management (AUM), hourly fee or flat fee. Fee-only fiduciary advisors receive no other compensation and therefore are free to choose the investments that best diversify client's assets, without regard to product-based compensation.

This eliminates many of the most serious financial conflicts of interest inherent in the insurance and broker-dealer world.

Hidden Costs Investors Pay

While some 401(k)-type retirement plans may choose to use mutual funds that provide revenue sharing in order to defray the plan's costs for recordkeeping or administration, typically that revenue share does not go to salesperson. Instead, it is credited to the plan, strictly for those expenses. In that example, any revenue share in excess of plan's costs is credited to plan participants annually. In other words, that kind of revenue sharing is not paid to the fee-only fiduciary advisor – it's used strictly for the plan's benefit. However, many fiduciaries encourage plan sponsors to move to lower expense share classes that do not have revenue sharing at all. The plan sponsor would simply pay the recordkeeping and administrative expenses directly. This separates the participant's investment performance from the plan's expenses and is considered a better practice. It is also a cost that can be less expensive if paid directly rather than through revenue sharing.

In contrast, when variable commissions and revenue sharing payments go to a non-fiduciary broker, insurance agent or other non-fiduciary, plan participants suffer, from expense drag and high costs that ultimately result in worse performance, less to reinvest and compound and smaller nest eggs. This can take away half of a retirement investor's nest egg over a career of saving for retirement.

The loopholes that opponents to the rule wish to preserve, permit the systematic overcharging of American retirees' nest eggs, allowing companies to siphon off half of a retirement nest egg over the years. Yale University's endowment manager, David Swenson, notes[9] that just 2% in excess commissions or fees, can reduce retirees' nest eggs by at least half. As investors save during their working years, DOL's own research pointed out that just 1% in excess fees strips out 28% of their nest egg, leaving retirees with less to put to work in the American economy during the retirement years, and more reliant on Social Security.

Over the long term, the fiduciary model helps plan participants in several important ways that contribute to better participant outcomes – a larger nest egg.

1. Mutual funds selected for a retirement plan are based on an Investment Policy Statement and sound investment theory, not how much they pay a non-fiduciary intermediary.

2. The fund choices reflect the plan's demographic make-up. This enhances the ability of the plan's participants to properly diversify their portfolio and modify that as their age requires.

3. Plan participants are often offered models to help with asset allocation often at no additional charge.

4. Plan expenses are kept reasonable or low and as a best practice, regularly benchmarked.

5. When participant outcomes are optimal, participants are encouraged and save more.

[9] "Three Investment Gurus Share Their Model Portfolios, NPR. http://www.npr.org/2015/10/17/436993646/three-investment-gurus-share-their-model-portfolios

In the non-fiduciary model, a non-fiduciary intermediary is paid a commission and often revenue sharing fees as well as 12b-1 fees – without rendering additional services. Often these costs are not transparent to the investor or the investor sees only a portion of them. This makes the plan more expensive for the participants and is a serious drag on performance and participant outcomes over the long term.

In the IRA marketplace, the fiduciary model makes an even bigger difference. From The Committee's prior comment letter:

"After a careful review of the evidence, which consistently points to a substantial failure of the market for retirement advice, the DOL estimated that IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 50 to 100 basis points per year over the next 20 years. Based on this careful review of the evidence, the DOL concluded that the underperformance associated with conflicts of interest – in the mutual funds segment alone – could cost IRA investors between $95 billion and $189 billion over the next 10 years and between $202 billion and $404 billion over the next 20 years. An ERISA plan investor who rolls her retirement savings into an IRA could lose 6% to 12% and possibly as much as 23% of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial adviser. These DOL estimates are conservative. The harm to retirement savers is far greater when you consider the full range of products and the full range of conflicts that influence advisers' investment recommendations."

This means that when plan participants and IRA investors receive "advice" from non-fiduciaries, they retire with smaller nest eggs and often are more dependent on Social Security and other programs.

Vanguard, Schwab, Betterment, WealthFront and others offer inexpensive investment management for very low cost with very low account minimums: $5,000 minimum at some, no minimum at others. Some automated investment firms offer their services for $0 until an account grows to a certain level.

Some fiduciaries, such as Financial Engines, one of the largest RIAs in the US, have tackled both the "accumulation" phase as well as the "decumulation" phase, assisting plan participants with withdrawal plans at the same cost as their reasonable cost for the accumulation phase. Instead of rolling over from a plan into an IRA (with potentially higher costs), or a variable, fixed or fixed indexed annuity (with typically much, much higher costs and considerable, irreparable harm to the investor), a participant can stay in the plan and receive regular monthly or quarterly distributions from the plan. So, if a participant pays, for example, .50 basis points annually for professional investment management in the plan, they pay the same amount for the investment management and distributions during the decumulation phase.

I am not advocating any one firm here, but it's important to note that this kind of continuous care model for accumulation and decumulation at very reasonable cost is a good thing for many investors and it's something that ought to be encouraged.

Conclusion

The Fiduciary Rule strengthens protections for retirement savers by requiring financial advisers and their firms to provide retirement investment advice that is in their clients' best interests.

Further delaying implementation of the rest of the Rule, or weakening or diluting any of the important new investor protections would allow non-fiduciary financial advisers and their firms to continue to engage in harmful practices that threaten the retirement security of their clients. *According to the prior Administration's DOL's own analysis, as well as the Courts' rulings, this would be unjustified.*

As a fiduciary, I can see no reason to delay implementation of the rest of this important Fiduciary Rule. *When a firm wishes to serve the retirement market, advice they provide should be in the investor's best interest – from a fiduciary*. No firm should be allowed to pretend they act in investors' best interests while actually serving themselves.

Millions of Americans are counting on their 401(k)s and IRAs, and many employers depend on investment professionals for advice about managing these complex retirement plans. The advice investors get makes a difference in the success of their retirement savings outcome, and whether they will have a financially secure retirement. If they are steered into investments that are not in their best interest, but pay unreasonably high commissions or fees to non-fiduciaries, they may not be able to retire securely – or even at all.

The DOL rule:

- Closes unintended loopholes in the law, which allowed non-fiduciaries to evade their duty to serve investors' best interest.
- Strengthens protections for retirement savers, requiring firms and their representatives to provide retirement investment advice that is in investors' best interests.
- Means there will be more fiduciary advice available, in the best interest of investors, at a reasonable cost.

As a result, retirement savers will be confident that when they engage an advisor, they will receive competent, objective advice, instead of a sales pitch disguised as advice. Americans who've worked hard to save for retirement need and deserve these basic, common sense protections.

Further delaying implementation or weakening these new protections would allow non-fiduciaries and their firms to continue to engage in harmful conflicts of interest that threaten the retirement security of American retirement investors as well as the American economy.

If the current Administration's DOL decides to further delay or weaken the rule, it would be taking the position that those who oppose the Fiduciary Rule, whose model is, instead, to act in their own interests – should prevail, rather than American retirement savers' interests in receiving the critical protections from the rule.

Retirement savers need and deserve to receive the protections that the current DOL Conflict of Interest - Fiduciary Rule provides, without further delay. The DOL should conclude that the rest of the 2016 Final DOL Conflict of Interest - Fiduciary Rule, undiluted, should be implemented no later than Jan 1st, 2018.

Sincerely,

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